

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHELE T.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 3:20-cv-06085-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13. *See also* Consent to Proceed Before a United States Magistrate Judge, Dkt. 3. This matter has been fully briefed. *See* Dkts.23, 34, 38.

Plaintiff suffers from diabetic neuropathy which causes numbness in her feet. The ALJ found the opinion of her longtime treating physician on plaintiff's limitations was inconsistent with objective medical evidence, including the findings of a treating neurologist. Because

1 substantial evidence supports the ALJ's finding, and because plaintiff has not shown any
2 constitutional defect in the decision, the Court affirms.

3 PROCEDURAL HISTORY

4 Plaintiff's application for disability insurance benefits ("DIB") pursuant to 42 U.S.C. §
5 423 (Title II of the Social Security Act) was denied initially and following reconsideration. *See*
6 AR 75, 83. Plaintiff's requested hearing was held before Administrative Law Judge Allen G.
7 Erickson ("the ALJ") on February 6, 2020. *See* AR 38–74. On February 18, 2020, the ALJ issued
8 a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the
9 Social Security Act. *See* AR.20–36.

10 On September 10, 2020, the Appeals Council denied plaintiff's request for review,
11 making the written decision by the ALJ the final agency decision subject to judicial review. AR.
12 1; *see* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the
13 ALJ's written decision in November 2020. *See* Dkt. 1. Defendant filed the sealed administrative
14 record regarding this matter ("AR.") on May 12, 2021. *See* Dkt. 15.

15 BACKGROUND

16 Plaintiff was born in 1962 and was 55 years old on the alleged date of disability onset of
17 December 21, 2017. *See* AR 218. Plaintiff has past work experience as a cashier checker, but
18 quit due to foot pain that prevented her from standing for long periods. AR 48.

19 According to the ALJ, plaintiff has at least the severe impairment of diabetic neuropathy.
20 AR 25.

21 STANDARD OF REVIEW

22 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
23 social security benefits if the ALJ's findings are based on legal error or not supported by
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substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) whether the ALJ erred in evaluating the medical opinion evidence; and (2) whether the ALJ's decision was constitutionally defective, because the statute governing the Commissioner's appointment and tenure violated the Constitution's separation of powers. *See* Dkt. 23, p. 1.

1. Whether the ALJ Erred in Evaluating the Medical Opinion Evidence

Plaintiff assigns error to the ALJ's evaluation of an opinion from John C. Bausher, M.D., Ph.D. *See* Dkt. 23, p. 8.

A. Medical Opinion Standard of Review

The Ninth Circuit has held that deference is due to a treating or examining doctor's opinion and that if an ALJ rejects such an opinion and the opinion is contradicted by another doctor's opinion, the "ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014). For applications beginning March 27, 2017, however, the Administration has directed ALJs that they are no longer to defer to medical opinions from treating or examining sources (*see* 20 C.F.R. § 404.1527(c)), instead evaluating the persuasiveness of medical opinions by analyzing their "supportability" and "consistency," as well as other appropriate factors. 20 C.F.R. § 404.1520c(a). Because plaintiff's claim was filed in December 2017, the new regulations apply to the instant case.

This Court—and others—have concluded that the new regulations supplant judicial precedent regarding the weight given to controverted examining and treating source opinions, to

1 the extent that there is a conflict. *See* Dkt. 20, *Mooney v. Commissioner of Social Security*, 3:19-
2 cv-05103-RBL-JRC, (W.D. Wash. Feb 14, 2020), *report and recommendation adopted*, 2020
3 WL 1139765; *Martinson v. Commissioner of Social Security*, 3:20-cv-05149-JRC (W.D. Wash.
4 August 25, 2020); *see also Gretchen S. v. Saul*, No. 6:19-CV-01842-IM, 2020 WL 6076265, at
5 *4 (D. Or. Oct. 15, 2020) (ruling that the broad authority conferred on the Administration by 42
6 U.S.C. § 405 means that prior judicial precedent must yield in the face of new, permissible
7 regulations and that “[a]s such, the 2017 regulations apply here and displace any case law
8 precedent to the extent required to do so.”), *appeal filed* December 6, 2020; *see also Allen T. v.*
9 *Saul*, No. EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29, 2020) (“[T]he Court
10 is mindful that it must defer to the new regulations, even where they conflict with prior judicial
11 precedent. . . .”).

12 Nevertheless, the Court makes no ruling in this case about whether the specific and
13 legitimate standard of review continues to apply. Resolution of this issue is not necessary to
14 decide this case: regardless of the outcome of this issue, the Court must review whether the
15 ALJ’s decision is supported by substantial evidence and is free from legal error. *See Lambert v.*
16 *Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020). That is, the ALJ “must provide sufficient reasoning
17 that allows us to perform our own review, because the grounds upon which an administrative
18 order must be judged are those upon which the record discloses that its action was based.” *Id.*
19 (internal citations and quotations omitted). Applying this standard—and regardless of the
20 continued viability of the requirement that an ALJ provide specific and legitimate reasons to
21 reject a controverted treating doctor’s opinion—the Court concludes that the ALJ’s findings
22 were supported by substantial evidence.

1 B. Opinion of John C. Bausher, M.D., Ph.D.

2 Dr. Bausher, plaintiff's treating physician for 31 years, completed a physical functional
3 assessment form on December 27, 2019, offering his opinion on plaintiff's physical limitations.
4 *See* AR 468–70. Therein, he indicated that plaintiff could sit for no more than one hour at a time
5 and stand for no more than 30 minutes at a time; could sit for a total of two hours, and stand or
6 walk for less than two hours, of an eight-hour workday; would need to take unscheduled breaks
7 “every hour or less” during the workday; and could be expected to be off-task for 30% of the
8 workday. AR 468, 470. In addition, he indicated that plaintiff could never lift loads greater than
9 ten pounds, and could rarely lift loads less than that; and that plaintiff would have significant
10 limitations with reaching, handling, and fingering, being able to handle 30% of the time
11 bilaterally, finger 40% of the time with her left hand, and 30% of the time with her right; and
12 could reach in front 30% of the time and 10% of the time overhead with either arm. AR 469.

13 The ALJ found Dr. Bausher's opinion unpersuasive by virtue of its inconsistency with (1)
14 his own physical examination notes; (2) the findings of plaintiff's treating neurologist; and (3)
15 plaintiff's self-reports indicating she had no upper extremity issues and did not have neuropathy
16 in her hands. AR 30.

17 With respect to this second reason, when conflicting medical evidence is present, the ALJ
18 is charged with determining credibility and resolving any conflicts. *Chaudhry v. Astrue*, 688 F.3d
19 661, 671 (9th Cir. 2012). Here, the ALJ found that Dr. Bausher's opinion was inconsistent with
20 Dr. Miller's clinical findings of intact muscle strength, tone and bulk, stable gait without ataxia,
21 intact reflexes, and no evidence of limb or truncal ataxia. AR 30 (citing AR 403–04). In arguing
22 against the ALJ's finding, plaintiff notes that Dr. Miller credited plaintiff's complaint of
23 numbness in her feet. Dkt. 23, p. 12. The ALJ, however, specifically accounted for these
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1 complaints of foot numbness in plaintiff's RFC determination, but still found that this ailment
2 did not cause the extent of limitations opined by Dr. Bausher.

3 It is not unusual for different health professionals to reach different conclusions. The ALJ
4 is the one who must choose between these conclusions and provide specific and legitimate
5 reasons of doing so. The ALJ did so here. Substantial evidence supported the ALJ's conclusion
6 that plaintiff's overall presentation and performance on physical examinations, particularly
7 before Dr. Miller, showed her health to be in a better state than that which the limitations
8 assessed by Dr. Bausher would indicate. *See* 20 C.F.R. §§ 404.1520(c)(2) ("The more
9 consistent a medical opinion(s) or prior administrative medical finding(s) is with the evidence
10 from other medical sources or nonmedical sources in the claim, the more persuasive the medical
11 opinion(s) or prior administrative medical finding(s) will be."). The Court has reviewed the
12 records relied upon by the ALJ and determined that they meet the substantial evidence standard.

13 Although the ALJ provided additional reasons for discounting Dr. Bausher's opinion, the
14 Court need not assess whether these reasons were proper, as any error would be harmless. *See*
15 *Presley-Carrillo v. Berryhill*, 692 Fed. Appx. 941, 944–45 (9th Cir. 2017) (citing *Carmickle v.*
16 *Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (although an ALJ erred
17 on one reason he gave to discount a medical opinion, "this error was harmless because the ALJ
18 gave a reason supported by the record" to discount the opinion).

19 2. Whether the ALJ's Decision was Constitutionally Valid

20 Next, plaintiff asserts that the ALJ's decision was constitutionally defective, because
21 recent Supreme Court decisions call into question the constitutionality of a statute limiting the
22 President's removal power over the Commissioner of Social Security. Dkt. 23, p. 4.

1 Removal of the Commissioner of Social Security is governed by 42 U.S.C. § 902(a)(3).
2 Under § 902(a)(3), the Commissioner may only be removed from office “pursuant to a finding
3 by the President of neglect of duty or malfeasance in office.” *Id.* Plaintiff contends § 902(a)(3)
4 violates separation of powers under Article II of the United States Constitution, and therefore the
5 Commissioner's final decision denying Plaintiff benefits was made by individuals who lacked
6 valid delegated authority to make the decision. Dkt. 23 at 4; Dkt. 38 at 3. Plaintiff's argument
7 relies upon the Supreme Court decisions in *Seila Law LLC v. Consumer Financial Protection*
8 *Bureau*, 140 S. Ct. 2183 (2020), and *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

9 In *Seila Law*, the Supreme Court held the Consumer Financial Protection Bureau's
10 (“CFPB”) removal structure limiting the removal of the CFPB Director by the President only for
11 “inefficiency, neglect of duty, or malfeasance of office,” 12 U.S.C. § 5491(c)(3), violated
12 separation of powers. *Seila Law*, 140 S. Ct. at 2197. In *Collins* the Court held a provision
13 limiting the President to removing the Directors of the Federal Housing Finance Agency
14 (“FHFA”) only for cause violated the separation of powers. *Collins*, 141 S. Ct. at 1783 (holding
15 “*Seila Law* is all but dispositive”).

16 A straightforward application of *Seila Law* and *Collins* dictates a finding that §
17 902(a)(3)'s removal provision violates separation of powers. As in *Seila Law* and *Collins*, the
18 Social Security Commissioner is a single officer at the head of an administrative agency and
19 removable only for cause. *See* 42 U.S.C. § 902(a)(3). Section 902 thus has the same infirmity as
20 the removal provisions at issue in *Seila Law* and *Collins*. The Court accordingly concludes §
21 902(a)(3) violates separation of powers. *See Seila Law*, 140 S. Ct. at 2197; *Collins*, 141 S. Ct. at
22 1783.

1 In her reply brief, plaintiff suggests § 902 may be constitutional because “in *dicta*, the
2 *Seila Law* court questioned whether § 902(a)(3) was unconstitutional.” Dkt. 29 at 8. The *Seila*
3 *Law* Court noted differences between the SSA and CFPB but did not find the differences
4 rendered § 902(a)(3) constitutional or rendered CFPB’s removal limitation unconstitutional. *See*
5 *Seila Law*, 140 S. Ct. at 2202. The *Collins* Court clarified that “[c]ourts are not well-suited to
6 weigh the relative importance of the regulatory and enforcement authority of disparate agencies,
7 and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.”
8 141 S. Ct. at 1785. This clarification precludes the possibility § 902(a)(3) is constitutional based
9 upon *dicta* in *Seila Law*.

10 Having concluded §902(a)(3)'s removal provision violates separation of powers, the
11 Court turns to the parties' dispute over the proper remedy. Plaintiff contends under *Seila Law* and
12 *Collins*, the remedy is reversal because the § 902's removal clause renders the Social Security
13 Administration's structure unconstitutional, and "the Commissioner had no authority to delegate
14 leaving the ALJ here and the Appeals Council without any authority . . . to make findings of fact
15 and issue decision as to benefits eligibility." Dkt. 23 at 6. In her reply brief, Plaintiff amplifies
16 this argument arguing Presidential power over an agency is "like water flowing" and §
17 902(a)(3)'s infirm removal clause "stops the flow of authority such that the Commissioner and
18 inferior officers below do not have delegated authority." Dkt. 38 at 6.

19 Plaintiff's argument is similar to arguments the plaintiffs raised and the Court rejected in
20 *Seila Law* and *Collins*. First, like the plaintiffs in *Seila Law*, plaintiff here argues § 902(a)(3)'s
21 removal provision automatically renders all agency action unconstitutional. The Court in *Seila*
22 *Law* rejected such an argument observing one section of a statute may violate the Constitution
23 without rendering the entire act void. *Seila Law*, 140 S. Ct. at 2209. The Court stated the removal
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1 limitation of the CFPB Director is the only defect and removal of the defect removes the
2 constitutional violation. The Court concluded the removal limitation was severable because the
3 CFPB is capable of functioning independently of the infirm removal clause. *Id.* at 2209 ("The
4 provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully
5 operative without the offending tenure restriction. Those provisions are capable of functioning
6 independently, and there is nothing in the text or history of the Dodd-Frank Act that
7 demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President.");
8 *see also* 140 S. Ct. at 2245.2

9 Similarly, if the removal clause in § 902(a)(3) is severed, the SSA remains fully
10 functional. This is evident because there can be no dispute that since the promulgation of §
11 902(a)(3), the SSA has continued to function fully and has granted and denied thousands of
12 benefits applications. It should be noted that the Administration continues to function even if the
13 Commissioner's position is temporarily unfilled or delegated to an acting Commissioner. It
14 would be unrealistic to imagine that the work of the entire Administration suddenly stops
15 whenever the Commissioner is unavailable, or the position is temporarily vacated for any reason.
16 The work of the Administration must go on. Indeed, plaintiff's suggestion that there is no need
17 to "unwind favorable decisions" made by the SSA notwithstanding § 902(a)(3) infirm removal
18 clause, supports this conclusion. Dkt. 38 at 8. The Court concludes, just as the Court in *Seila Law*
19 found, that § 902(a)(3)'s removal clause is the only constitutional defect in this case. The clause
20 is severable because if removed the constitutional violation disappears, and the SSA remains
21 fully operational and functional without the infirm tenure provision.

22 The Supreme Court in *Collins* also rejected the argument that an invalid removal
23 provision rendered the FHFA's actions void from the outset. The Supreme Court stated there was
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1 "no reason to hold that the third amendment must be completely undone." *Collins, supra.* at
2 1788. The *Collins* Court further stated "[a]lthough the statute unconstitutionally limited the
3 President's authority to *remove* the confirmed Directors, there was no constitutional defect in the
4 statutorily prescribed method of appointment to that office. As a result, there is no reason to
5 regard any of the actions taken by the FHFA [challenged on appeal] as void."). *Collins*, at 1787.
6 Accordingly, the argument the SSA's actions here are either void *ab initio* or became void at
7 some later point due to § 902(a)(3)'s removal clause is not supported by either *Seila Law* or
8 *Collins*.

9 While the Supreme Court in both *Seila Law* and *Collins* held an unconstitutional removal
10 clause does not automatically void agency action and mandate reversal, the Court in *Collins*
11 addressed whether reversal is appropriate if harm could be shown. The *Collins* Court found it
12 was "possible for an unconstitutional provision to inflict compensable harm," and the
13 "possibility that the unconstitutional restriction on the President's power to remove a Director of
14 the FHFA could have such an effect cannot be ruled out." 141 S. Ct. at 1788–89.

15 In her reply brief, plaintiff argues "[Commissioner] Saul's actions, under constitutional
16 authority or not, have caused specific harm by undermining, politicizing and reducing due
17 process protections to Plaintiff's claims." Dkt. 38 at 4. This argument that there is a possibility §
18 902(a)(3) harmed plaintiff fails to recognize the significant difference between the agency action
19 in *Collins* and the SSA action here.

20 In *Collins*, the Directors of the FHFA adopted an amendment (the "Third Amendment")
21 to certain financial agreements that "materially changed the nature of the agreements" and
22 resulted in the companies in which plaintiffs were shareholders transferring to the U.S. Treasury
23 "at least \$124 billion dollars more than the companies would have had to pay" under the prior
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1 form of the agreements. *Id.* at 1774. The plaintiffs in *Collins* thus had an identifiable basis to
2 contend that but for the unconstitutional removal provision, the President may have removed and
3 appointed a different Director who would have disapproved of the adoption (or implementation)
4 of the Third Amendment. *See id.* at 1789.

5 In contrast, there is nothing showing the Commissioner or the SSA implemented new and
6 relevant agency action that may have turned upon the President’s inability to remove the
7 Commissioner. Plaintiff has not identified any new regulations, agency policies or directives
8 Commissioner Saul installed that may have affected her claims. Plaintiff thus fails to show how
9 or why § 902(a)(3) removal clause possibly harmed her.

10 There is also nothing showing former President Trump would have removed
11 Commissioner Saul and appointed a new Commissioner who would have administered this
12 plaintiff’s claims differently. Rather, former President Trump appointed Commissioner Saul, and
13 was still in office on February 18, 2020, when the ALJ’s decision that plaintiff challenges was
14 issued. *See* AR 20–36. This remained the case on September 10, 2020, when the Appeals
15 Council issued its decision denying plaintiff’s request for review. AR 1–6. Thus, plaintiff’s
16 argument that the “efforts of the Appeals Council to exhaust Plaintiff’s administrative remedies
17 lack any presidential authority” is unsupported. Dkt. 38, p. 7. Accordingly, because there is no
18 evidence that the former president sought to remove Commissioner Saul, there is no connection
19 between § 902(a)(3)’s removal clause and possible harm the removal clause might have caused
20 plaintiff. *Cf. Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring) (“[G]iven the majority’s remedial
21 analysis, I doubt the mass of SSA decisions—which would not concern the President at all—
22 would need to be undone. . . . When an agency decision would not capture a President’s
23 attention, his removal authority could not make a difference.”).

1 Even assuming §902(a)(3)'s removal clause prevented former President Trump from
2 removing Commissioner Saul and confirming a different Commissioner, there is no possibility §
3 902(a)(3) harmed plaintiff, because the final decision of the Commissioner that is before this
4 Court for review is the ALJ's decision. The ALJ's decision in this case is based upon an
5 uncontested factual record and the application of governing law, including unchallenged
6 regulations. The ALJ's decision and the administrative record are both subject to review by this
7 Court. The specific Commissioner who heads the SSA or any directive the Commissioner gave
8 regarding plaintiff's case would not alter the viability of the ALJ's decision herein. This is
9 because the Court has reviewed the record and the ALJ's decision at issue and concludes that the
10 ALJ did not err, and that the case should be affirmed for these reasons. Had the Court found
11 otherwise and determined that the ALJ's decision was not supported by substantial evidence or
12 free of legal error, the Court would have reversed the Commissioner's final decision. Hence, the
13 Court reaches its decision to reverse or affirm the Commissioner's final decision notwithstanding
14 the existence of § 902(a)(3)'s removal clause, who the Commissioner was at the time the
15 decision became final, or what directives the Commissioner may have given the ALJ. The Court
16 thus concludes that there is no possibility § 902(a)(3)'s removal clause harmed plaintiff in this
17 case.

18 Plaintiff also mentions, in her reply brief, that the Commissioner's actions reduced "due
19 process protections." Dkt. 38, p. 4. *Seila Law* and *Collins* addressed infirm removal provisions
20 that the Court found violate separation of powers, not due process; these cases thus provide no
21 basis to support a due process claim. Additionally, a conclusory allegation that due process was
22 denied is not sufficient to raise a colorable constitutional claim. *See e.g. Hoye v. Sullivan*, 985
23 F.2d 990, 992 (9th Cir. 1992).

1 In sum, the Court finds § 902(a)(3)'s unconstitutional removal clause does not
 2 automatically void the actions of the SSA or the Commissioner's final decision in this case.
 3 Reversal is not mandated under *Seila Law* or *Collins* because § 902(a)(3)'s removal clause is
 4 severable, and because there is no possibility § 902(a)(3)'s removal clause harmed Plaintiff.
 5 Based upon the Court's review of the administrative record and the ALJ's decision the Court
 6 finds the ALJ did not err in discounting Dr. Bausher's opinion. This finding is not contingent
 7 upon or affected by § 902(a)(3) and Plaintiff thus fails to show the removal provision in §
 8 902(a)(3) is connected to the ALJ's decision denying her benefits. *See Decker Coal Co. v.*
 9 *Pehringer*, 8 F.4th 1123, 1138 (9th Cir. 2021) ("[T]here is no link between the ALJ's decision
 10 awarding benefits and the allegedly unconstitutional removal provisions. And nothing commands
 11 us to vacate the decisions below on that ground.")).

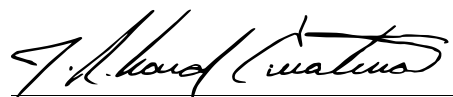
12 The Court accordingly concludes that while § 902(a)(3) violates separation of powers, the
 13 violation is not grounds to reverse the Commissioner's final decision and remand the matter in
 14 this case. Rather, the basis of the Court's determination to reverse the Commissioner's final
 15 decision is the Court's independent review of the administrative record and the ALJ's decision,
 16 and the Court's conclusion the ALJ did not err.

17 CONCLUSION

18 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be
 19 **AFFIRMED.**

20 **JUDGMENT** is for the defendant and the case is closed.

21 Dated this 17th day of November, 2021.

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23 J. Richard Creatura
 24 Chief United States Magistrate Judge